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NO. 59366-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re DNA Testing Petition of

BOBBY R. THOMPSON,

Appellant.

STATE OF WASHINGTON,

Respondent,

v.

BOBBY R. THOMPSON,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) Is an order denying DNA testing appealable as a matter of right?

(2) According to undisputed evidence at trial, police saw Thompson pushing a badly-beaten rape victim out of the room where the rape occurred. The victim immediately identified him as the rapist. In his motion for post-conviction DNA testing, Thompson provided no explanation of these facts. Did the trial court abuse its discretion in ruling that there was no likelihood that DNA evidence would demonstrate Thompson's innocence?

(3) In ruling on a motion for post-conviction DNA testing, can the court consider evidence that was available at trial but not introduced?

(4) When a convicted offender appeals from the denial of post-conviction DNA testing, does he have a statutory right to counsel at public expense?

(5) Under RAP 15.2, does a trial court have the power to enter an order of indigency in an appeal from an order denying post-conviction DNA testing?

II. STATEMENT OF THE CASE

A. EVIDENCE AT TRIAL.

On the evening of April 13, 1995, J.S. went with some friends to the Riviera, a bar in Lynnwood. During the evening, she had a brief conversation with the appellant, Bobby Thompson. At around 1:45 on the morning of the 14th, Thompson told her that there was an after-hours party across the street. J.S. told her friends that she would check out the party and come back, because she didn't have a ride home. 1 RP 59-62.

Thompson took J.S. across the street, to the Landmark Hotel. He took her up some fire escape stairs into a room. No one else was in the room. She told Thompson that she had to leave. He hit her with his fist and knocked her unconscious. 1 RP 64-66.

When J.S. regained consciousness, she was on the bed. Thompson was on top of her, raping her. She tried to push him off and get away. He pulled her by her hair into the center of the room, hit her some more, and raped her again. She again lost consciousness and again awoke to find Thompson raping her. 1 RP 63-71.

At one point, she tried to lock herself in the bathroom. He followed her in and threw her head against the wall, again knocking

her out. When she woke up this time, the bathtub was full of water, and Thompson was trying to drown her in it. J.S. did not remember anything further until she woke up in the hospital. 1 RP 72-73.

Shortly before 3 a.m., Lynnwood Police received a report of a domestic disturbance in room 111 of the Landmark Hotel. When officers arrived, they saw Thompson leaving the room with J.S. He took her to a nearby emergency exit and started pushing her out the door. J.S. saw the officers and started yelling hysterically that he'd beat her and was going to kill her. Thompson continued pushing her out the door. The officers arrested Thompson and summoned aid for J.S. 1 RP 38-41; 2 RP 39, 53-54.

J.S. was crying, shaking, and "out of control." Her shirt was open in the front. Her face was swollen. Her eyes were protruding, and blood was coming down from them. 1 RP 41-42. She had swelling in the forehead and lumps on the back of her head. There was redness around her neck, consistent with being choked. 1 RP 31. She told aid personnel that she had been both beaten and kicked. 2 RP 33.

On searching room 111, police found blood on the sheets of one of the beds. Between the beds, there were streaks of blood, as if something bloody had been dragged across the floor. There was

blood on the bathroom wall. In a sink outside the bathroom, there was a washrag that appeared to have blood soaked into it. 2 RP 46-48.

Forensic analysis showed that the blood type on the sheets was the same as that of J.S. Sperm was found on vaginal swabs taken from her. There was acid phosphatase on the sheets, indicating the presence of semen. Due to a lack of time, no DNA analysis was conducted. 2 RP 72-79.

Hotel records showed that room 111 was registered to Thompson. He had registered as a representative of Loram Corporation, with a Minnesota address. There were 12 or 13 rooms registered to that company. 2 RP 86-88.

At trial, J.S. was cross-examined about a defense interview at which she had described the assailant. She said that she thought he was five foot seven or eight, but she wasn't too sure. Thompson is six foot three. She also said that she wasn't too sure what color hair he had, and she wasn't too sure if he had facial hair. 1 RP 80-81.

The defense did not introduce any evidence. 2 RP 90.

B. MOTIONS AND ARGUMENT AT TRIAL.

At the beginning of trial, defense counsel moved for a continuance. He claimed that Thompson had told him "a week or two ago" that a co-worker fit J.S.'s description of the rapist. 1 RP 6. He asked for time to subpoena this person and obtain a copy of his driver's license. Counsel had no explanation of why Thompson had taken so long to provide this information. 1 RP 8-9. Counsel did not mention any desire to obtain DNA evidence. The court denied the continuance. 1 RP 16.

During motions in limine, the parties discussed a statement that Thompson had given to police. They stipulated that the State would not use this statement in the case in chief. The parties agreed that the statement was voluntary and could be used if the defendant testified. 1 RP 18-19.

In closing argument, defense counsel criticized the State for failing to present DNA evidence. He said that the justification of overwork was "not acceptable." "What is acceptable is to do the most rigorous testing to make sure you're presenting a case to the jury that meets all the elements, that presents with you all the evidence." 2 RP 100-01.

A jury found Thompson guilty of first degree rape, as charged. On appeal, this court affirmed the conviction. 1 CP 15-16.

C. MOTION FOR DNA TESTING.

In September, 2006, Thompson filed a motion for post-conviction DNA testing. The factual support for the motion consisted of portions of the trial transcripts. Thompson did not submit any other evidentiary materials. Nor did he provide any explanation – sworn or unsworn – of the facts establishing his guilt. 1 CP 89-109.

The State's response included a copy of Thompson's sworn statement to police, given on the morning of his arrest. In it, he claimed that J.S. had proposed having sex with him for money. When he met her, she already had a big bruise under her left eye and her lip was bleeding. Thompson said that he refused to pay. He nonetheless had consensual sexual intercourse with her. When he climaxed, she grabbed him, and he hit her with the back of his hand across her face. They started arguing. "One minute she would be screaming something about killing her." When they went out the door, the police were there. 1 CP 75-76 (App. B).

Thompson filed a reply. He still provided no explanation for the inculpatory evidence. He did not explain or even mention his statement to police. 1 CP 46-58. The court denied Thompson's motion. 1 CP 44-45 (App. A). Thompson has appealed.

III. ARGUMENT

A. THE STATE AGREES THAT AN ORDER DENYING DNA TESTING IS APPEALABLE UNDER RAP 2.2(b)(13).

This court has directed briefing on whether the denial of a motion for DNA testing is appealable as a matter of right. The State agrees with the appellant that it is. RAP 2.2(a)(13) allows appeal of "[a]ny final order made after judgment that affects a substantial right." RCW 10.73.170 grants a right to DNA testing at public expense, if the requirements set out in that statute are satisfied. When a trial court determines that the requirements were not satisfied, that order "affects a substantial right" and is appealable.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THOMPSON'S MOTION FOR POST-CONVICTION DNA TESTING.

1. The Legislature Has Authorized Post-Conviction DNA Testing Only When There Is A Credible Showing That It Likely Could Benefit An Innocent Person.

There is no constitutional right to post-conviction DNA testing. District Attorney's Office v. Osborne, ___ U.S. ___, 129 S.

Ct. 2308, 174 L. Ed. 2d 38 (2009). The Washington Legislature has, however, authorized the use of public funds for such testing under specified circumstances. The issue in this case is whether Thompson has met these statutory requirements.

The Legislature first provided for post-conviction DNA testing in 2000. Laws of 2000, ch. 92, § 1. That statute provided for an administrative procedure. The decision whether to authorize testing was made by the prosecutor, with appeal to the attorney general. This statute expired December 31, 2004.

In the 2004 legislative session, a bill was introduced to re-authorize post-conviction testing. The decision-making authority was to be transferred to the court of conviction. HB 2872 (2004) (App. B). This bill was not enacted.

A similar bill was introduced the next year. HB 1014 (2005) (App. G). The House Bill Report explained the relationship of this bill to the previous year's bill: "This was an agreed upon bill in 2004, but due to lack of time, the Legislature did not get a chance to have it moved and voted off the suspension report." House Bill Report on SHB 1014 at 3 (2005) (App. J). The 2005 version of the bill was enacted.

Post-conviction DNA testing involves a balancing of interests. On the one hand, it is important to have "a process ... in place for cases where DNA tests could provide evidence of a person's innocence." House Bill Report on HB 2872 at 3 (2004). On the other hand, it is important to avoid unnecessary testing. Post-conviction testing can be costly and place a burden on laboratories that are already overloaded. It does not always lead to useful results. Osborne, 129 S.Ct. at 2327-29 (Alito, J., concurring).

[E]xperience also points to the need to ensure that post-conviction DNA testing is appropriately designed so as to benefit actually innocent persons, rather than actually guilty criminals who wish to game the system or retaliate against the victims of their crimes. Frequently, the results of post-conviction DNA testing sought by prisoners confirm guilt, rather than establishing innocence. In such cases, justice system resources are squandered and the system has been misused to inflict further harm on the crime victim.

149 Cong. Rec. S14046 (daily ed. Nov. 5, 2003) (statement of Sen. Kyl, quoting Sarah Hart, Director, National Institute of Justice).

The Washington statute resolves this problem by setting a high standard for testing. "By keeping the high 'proof of innocence' standard in the bill, the number of requests will remain low and testing will only be ordered in cases where there is a credible

showing that it likely could benefit an innocent person.” House Bill Report on HB 2872 at 3 (2004) (App. E).

2. In View Of The Overwhelming Evidence Of Thompson’s Guilt, And His Failure To Present Anything Contradicting That Evidence, The Trial Court Properly Exercised Its Discretion In Finding That There Was No Likelihood That DNA Evidence Would Demonstrate His Innocence.

To obtain testing under RCW 10.73.170, a convicted person must satisfy the following standard:

The court shall grant a motion requesting DNA testing under this section if ... the convicted person has shown the likelihood that the DNA testing would demonstrate innocence on a more probable than not basis.

This statute “asks a defendant to show a reasonable probability of his innocence before requiring State resources to be expended on a test.” State v. Riofta, 166 Wn.2d 358, 370 ¶ 30, 209 P.3d 467 (2009). In resolving this issue, the court will “consider the evidence produced at trial along with any newly discovered evidence and the impact that an exculpatory DNA test could have in light of this evidence.” Id. at 369 ¶ 28. The trial court’s application of the statutory standard will be reviewed for abuse of discretion. Id. at 370 ¶ 31.

Since the statute requires a “showing” by the convicted person, he bears the burden of proof. Here, Thompson has

provided virtually nothing to satisfy his burden. In *argument*, he has denied his guilt. 1 CP 91-92. He has not, however, been willing to make this denial under oath. In the State's response to Thompson's motion, it pointed out that his claim of innocence was "only supported by his unsworn self-serving statements." 1 CP 60. Thompson's reply consisted of more unsworn self-serving statements. 1 CP 48-49. The only sworn statement made by Thompson was offered by the State.¹ 1 CP 75-76.

RCW 10.73.170(1) requires "a *verified* written motion." "Verification requires a swearing to the truthfulness of the document by the signor." State v. Holland, 7 Wn. App. 676, 678, 501 P.2d 1243 (1972). The statute thus makes it clear that unsworn claims of innocence are insufficient to justify DNA testing. That is all that Thompson has provided.

The only facts brought forward by Thompson involve discrepancies between his appearance and a description given by the victim during a defense interview. 1 RP 80-81. Considering how brutally the victim was beaten, it is not surprising that she was

¹ Thompson is contesting the admissibility of this statement. Brief of Appellant at 15-16. This issue is discussed below in part III.B.3.

uncertain about some aspects of her assailant's appearance. These discrepancies could have great significance if the conviction rested on her identification alone. They have very little significance in a case where the convicted person was arrested while pushing the victim out of the room where the rape occurred. 1 RP 39.

Other "facts" supporting the petitioner's arguments are non-existent. Thompson's brief claims that "the victim's description of the rapist matched the physical characteristics of a co-worker" of Thompson. Brief of Appellant at 16. In support of this claim, he cites to a pretrial colloquy. In that colloquy, defense counsel recited information that he had been given by Thompson. Counsel stated, however, that Thompson would *not* testify. 1 RP 6.

The appellant's brief refers to this as an "offer of proof," but it was not. Counsel did not offer to prove anything. He recited factual claims made by the defendant, but he said that the defendant *would not* testify in support of those claims. This is simply one more example of Thompson making unsworn assertions that he will not repeat under oath.

Thompson also mentions evidence concerning the possible condition of the rapist's hands. A physician who examined the victim testified that if her injuries were inflicted with a bare fist, he

would expect there to be some injuries to the assailant's hand. 2 RP 20. Thompson's brief points out that there was no evidence at trial of any injuries to his hands. There was equally no evidence of the *absence* of injuries to his hands. The trial record is silent on this point, and Thompson has offered nothing additional. A silent record does not satisfy Thompson's burden of showing that DNA testing could demonstrate innocence. It is also not clear that the injuries were inflicted solely with the hands: J.S. told aid personnel that she had been kicked. 2 RP 33.

Furthermore, the only reason that DNA testing was not conducted prior to trial was that there was insufficient time available. 2 RP 80. Thompson never sought a continuance to allow testing. After waiting until the day of trial, he sought a continuance for an entirely different reason. 1 RP 6-16.

The record strongly suggests that Thompson did not want DNA evidence available at trial. In the colloquy concerning the continuance motion, defense counsel stated that he had been "asking to go to trial before all the investigation was done." 1 RP 7. In closing argument, defense counsel criticized the crime lab for failing to give a high enough priority to testing in this case. 2 RP

100-01. Clearly, defense counsel preferred to rely on the lack of DNA evidence rather than allow such evidence to be available.

"[T]he failure to seek DNA testing at trial is a factor the trial court may consider in deciding whether there is a 'likelihood' the requested testing would demonstrate innocence on a more probable than not basis." Riofta, 166 Wn.2d at 366 n. 1. If Thompson were truly innocent, it is hard to understand why he avoided testing that could have provided evidence of his innocence.

In a statement of additional authority, Thompson cites State v. Gray, ___ Wn. App. ___, 215 P.3d 961 (2009). There, this court overturned the denial of post-conviction DNA testing in a rape case. The conviction there rested primarily on eyewitness identification. Eyewitnesses failed to pick the convicted person from one montage, but they picked him from a second montage. The court noted that "[w]hile all the signs might point to Gray, we cannot disregard the possibility of flawed evidence." Id. at 967 n. 9.

In the present case, in contrast, there is no possibility of eyewitness misidentification. Thompson was arrested at the crime scene. He has never given any explanation of his presence there (apart from the statement to police that he is challenging). He has therefore failed his burden of establishing a likelihood that DNA

evidence would demonstrate innocence on a more probable than not basis. The trial court did not abuse its discretion in denying testing.

3. In Deciding Whether To Order Post-Conviction Testing, The Court Can Consider Any Admissible Evidence That Is Relevant To Establish The Person's Guilt Or Innocence.

In addition to the evidence discussed above, the State's response included Thompson's sworn written statement concerning the events on the night of the crime. 1 CP 75-76 (App. B). In the statement, he admitted having sexual intercourse with the victim but claimed that it was consensual. In the face of Thompson's unrefuted sworn statement that he had intercourse, there is no likelihood that DNA testing would demonstrate that intercourse did not occur. Of course, no DNA test can show whether the intercourse was consensual.

Thompson claims that this evidence cannot be considered. He points to the statement in Riofta that the court must consider "all of the evidence presented at trial or newly discovered." Riofta, 166 Wn.2d at 367 ¶ 24. This does not indicate that *only* such evidence can be considered. In Riofta, no one had offered any evidence that was neither presented at trial nor newly discovered. "General statements in every opinion are to be confined to the facts before

the court, and limited in their application to the points actually involved.” State ex rel. Wittler v. Yelle, 65 Wn.2d 660, 670, 399 P.2d 319 (1965). Riofta cannot be interpreted as deciding a question that was not before the court.

Nothing in RCW 10.73.170 supports any limitation on the evidence that can be considered. As discussed above, the purpose of the statute is to obtain evidence that might prove a convicted person’s innocence, without wasting money on tests that would simply confirm guilt. It is hard to see why the Legislature would want taxpayer money spent on tests that could not establish innocence, simply because the evidence proving this was available at trial.

Other portions of the Riofta decision refute any such requirement. As already pointed out, the decision allows a court to consider the petitioner’s failure to seek DNA testing prior to trial. Riofta, 166 Wn.2d at 366 n. 1. That failure would not be “newly discovered,” but it also would not normally be introduced into evidence at trial. The decision also allows a convicted person to seek DNA evidence that could have been obtained before trial. Evidence that could have been discovered before trial by the

exercise of due diligence is not "newly discovered evidence." State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

Thompson points out that there was no hearing to determine whether these statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). As discussed above, the convicted person bears the burden of proof in these proceedings. He has offered no evidence that the statement was improperly obtained.

Furthermore, even if there had been some Miranda violation, it would not affect the admissibility of the statement in this proceeding. Miranda requirements only affect the admissibility of statements in criminal cases. Baxter v. Palmigiano, 425 U.S. 308, 315, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); see Brewer v. Dept. of Motor Vehicles, 23 Wn. App. 412, 415, 495 P.2d 949 (1979) (statements obtained in violation of Miranda admissible in driver's license revocation proceedings). This case is not a criminal proceeding: it is a proceeding initiated by a convicted person to obtain expenditure of public funds. Furthermore, even in criminal proceedings, statements obtained in violation of Miranda can be used to impeach the defendant's testimony. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). Similarly,

Thompson's statements can be considered in this proceeding to impeach his claims of innocence.

The trial court thus properly considered Thompson's statement to police. In that statement, Thompson admitted having sexual intercourse with the victim. Thompson has offered nothing to show that the statement was coerced or unreliable in any way. In view of that statement, the trial court properly exercised its discretion in holding that there was no likelihood that DNA testing would demonstrate his innocence.

C. A CONVICTED OFFENDER IS NOT ENTITLED TO COUNSEL AT PUBLIC EXPENSE TO APPEAL AN ORDER DENYING POST-CONVICTION DNA TESTING.

1. Since The Appellant Can Be Required To Reimburse The Indigent Appeals Fund For The Cost Of Appointed Counsel, This Issue Is Not Moot.

In addition to the substantive issues discussed above, this case presents procedural issues. After filing his notice of appeal, Thompson moved for appointment of counsel and preparation of the record at public expense. The State argued that he was not entitled to either. This court granted appointment of counsel, without addressing the merits of the State's arguments. Rather, it directed counsel to brief the appropriate procedure for determining whether Thompson was entitled to an order of indigency. The court

subsequently granted Thompson's motion for preparation of the record at public expense. Counsel for Thompson then submitted a brief that addressed the merits of the trial court's ruling.

Thompson has thus obtained all of the benefits of an order of indigency, without this court ever determining whether he was entitled to one. Nevertheless, the issues are not moot. If Thompson has obtained financial benefits to which he was not entitled, he can be directed to repay them. When a party obtains benefits under a trial court order that is reversed, he can be directed to repay those benefits. RAP 12.8. The same should apply when a party obtains benefits under an appellate court order that is later determined to be improper. The possibility of restitution prevents a case from being moot. LaRue v. Harris, 128 Wn. App. 460, 115 P.3d 1077 (2005). This court should therefore determine whether Thompson should be required to repay the cost of appointed counsel.

2. RCW 10.73.170 Authorizes Appointment Of Counsel Solely To Prepare And Present Motions For Post-Conviction DNA Testing, Not To Appeal From Denial Of Such Motions.

RCW 10.73.170(4) addresses the appointment of counsel:

Upon written request by the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW

10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court may, in its discretion, may grant the request.

This statute only allows appointment of counsel for a limited purpose: to prepare and present a motion for DNA testing. It does not authorize the use of taxpayer money to pay for counsel at any other stage, such as on appeal. When a statute specifically confers the right to counsel at only certain stages of a proceeding, it impliedly excludes the right to counsel at other stages. In re Detention of Strand, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3210402 ¶ 17 (2009).

This conclusion is supported by the legislative history of RCW 10.73.170. The Legislature considered fiscal notes for both the 2005 and 2004 amendments. The 2005 fiscal note included an estimate for the cost of superior court hearings, but no estimated costs for appellate proceedings.² App. H. The 2004 fiscal note also included an estimate for costs by the Office of Public Defense

² Both of these fiscal notes are available on the Internet. The 2005 fiscal note is at <https://fortress.wa.gov/binaryDisplay.aspx?package=11088>. The 2004 fiscal note is at <https://fortress.wa.gov/binaryDisplay.aspx?package=8317>. (The final periods are not part of the web address.)

(OPD).³ App. F. It included estimated costs of appointed counsel at superior court hearings. No mention was made of appointed counsel in appellate proceedings. The Legislature thus did not anticipate expending public funds for appointment of counsel on appeal.

3. RCW 10.73.150, When Read In Conjunction With RCW 10.73.150, Only Authorizes Appointment Of Counsel In Cases Involving Challenges To Criminal Convictions, Not In DNA Testing Cases.

Thompson claims that he is entitled to appointed counsel under RCW 10.73.150:

Counsel shall be provided at state expense to an adult offender convicted of a crime ... when the offender is indigent ... and the offender:

- (1) Files an appeal as a matter of right;
- (2) Responds to an appeal filed as a matter of right or responds to a motion for discretionary review or petition for review filed by the state;
- (3) Is under a sentence of death and requests counsel be appointed to file and prosecute a motion or petition for collateral attack ...;
- (4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous...;

³ The local government fiscal note said that the OPD fiscal note would discuss indigent defense costs. OPD did not, however, submit a fiscal note.

(5) Responds to a collateral attack filed by the state or responds to or prosecutes an appeal from a collateral attack that was filed by the state;

(6) Prosecutes a motion or petition for review after the supreme court or court of appeals has accepted discretionary review of a decision of a court of limited jurisdiction; or

(7) Prosecutes a motion or petition for review after the supreme court has accepted discretionary review of a court of appeals decision.

Thompson claims that since this is an “appeal as a matter of right,” he is entitled to appointed counsel under subsection (1).

The interpretation of RCW 10.73.150 should be governed by two maxims. First, statutes on the same subject matter should be harmonized when possible. US West Communications, Inc. v. Wash. Utilities & Transportation Comm’n, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997). Second, the meaning of statutory language may be indicated or controlled by reference to associated language. State v. Flores, 164 Wn.2d 1, 185 P.3d 1038 (2008). Since subdivision (2) through (7) deal with appellate challenges to criminal convictions, subdivision (1) should be limited to such challenges. This construction eliminates any conflict between RCW 10.73.150 and 10.73.170.

Prior case law is consistent with this interpretation. This court has allowed appointment of counsel in appeals from denials

of motions to vacate or modify a judgment under CrR 7.8. State v. Thompson, 93 Wn. App. 364, 967 P.2d 1282 (1988); State v. Laranga, 126 Wn. App. 505, 108 P.3d 833 (2005). Both of these cases involve challenges to a criminal conviction or sentence.

The present case does not involve any challenge to Thompson's conviction. That conviction will remain in effect regardless of the outcome of this proceeding. At most, the proceeding could result in an order for testing. That testing could theoretically provide exculpatory evidence. Such evidence could then support a new proceeding to challenge the conviction. The present proceeding is three steps removed from any such challenge. The authorization for appointed counsel in RCW 10.73.150 does not extend to such proceedings.

A broader interpretation could lead to absurd results. For example, suppose that a prison inmate files a personal injury action, and the action is dismissed on summary judgment. The inmate could then appeal as a matter of right from that dismissal. This would be "an appeal as a matter of right" that was filed by "an adult offender convicted of a crime." Under a literal interpretation of RCW 10.73.150(1), the inmate would be entitled to counsel at state

expense to prosecute that appeal. Clearly this is not what the Legislature intended.

Another example is closely analogous to the present case. Suppose a convicted person submits a request to police or prosecutorial agencies for documents relating to his crime. Such a request *might* provide evidence that would support a challenge to the conviction. See, e.g., Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003) (conviction overturned based on evidence obtained by request under Freedom of Information Act). If an agency failed to produce the desired information, the inmate could bring a civil suit to obtain it. See RCW 42.17.340(1) (judicial review of refusal to produce document); Building Industry Ass'n v. McCarthy, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3260630 (10/13/09) (lawsuit challenging agency claim that documents did not exist). If the court gave judgment for the agency, the inmate could appeal as of right. Would he be entitled to counsel at public expense to litigate this proceeding?

RCW 10.73.150 can be reconciled with RCW 10.73.170. RCW 10.73.170 allows appointed counsel in proceedings to obtain DNA testing only at the superior court level. RCW 10.73.150 allows appointed counsel in appeals as of right brought by persons

challenging their convictions – a category that does not include proceedings to obtain DNA testing. Since this interpretation gives full effect to both statutory provisions, it should be adopted by the court.

4. If The Two Statutes Conflict, RCW 10.73.170 Prevails, Because It Is Clearer, More Specific, Was Enacted Later, And Appears Later In The Code.

If this court nevertheless finds an irreconcilable conflict between RCW 10.73.150 and 10.73.170, it should be resolved by applying the following rules:

- (1) the statutory provision that appears latest in order of position prevails unless the first provision is more clear and explicit than the last and (2) the latest enacted provision prevails when it is more specific than its predecessor.

State v. J.P., 148 Wn.2d 444, 452, 69 P.3d 318 (2003).

Applying the first rule, RCW 10.73.170 appears later in the code than 10.73.150. RCW 10.73.170(4) states that counsel may be appointed in DNA testing proceedings “solely to prepare and present a motion under this section.” RCW 10.73.150(1) says that counsel shall be provided when an offender “files an appeal as a matter of right,” but it does not specify the kinds of cases to which this applies. Thus, RCW 10.73.170 is more clear and explicit. Under the first rule set out in J.P., it prevails over RCW 10.73.150.

Applying the second rule, the relevant language of RCW 10.73.170 was enacted in 2005. Laws of 2005, ch. 5, § 1. RCW 10.73.150 was enacted in 1995 and has not been amended since. Laws of 1995, ch. 275, § 2. RCW 10.73.170 deals specifically with DNA testing proceedings, while RCW 10.73.150 is more general. Consequently, RCW 10.73.170 prevails under the second rule as well.

Under RCW 10.73.150(4), appointed counsel is unavailable to appeal the denial of a motion for DNA testing. Thompson was therefore not entitled to appointed counsel on this appeal. Counsel should be paid, but Thompson should be required to reimburse the Indigent Appeals Fund for that erroneous expenditure.

D. SINCE RCW 10.73.150 DOES NOT AUTHORIZE APPOINTMENT OF COUNSEL IN THIS CASE, RAP 15.2 DOES NOT GIVE TRIAL COURTS THE AUTHORITY TO ENTER ORDERS OF INDIGENCY.

The final issue is what procedure should have been used to determine Thompson's indigency. Since Thompson has received all of the benefits of an order of indigency, this issue is moot. This court will, however, review a moot case if it involves a matter of continuing and substantial public interest. In re Silva, 166 Wn.2d 133, 137 n. 1, 206 P.3d 1240 (2009). The issue presented in this

case is likely to arise in future cases. Trial courts will need guidance on how to handle motions for orders of indigency. This issue should therefore be reviewed.

The procedure for orders of indigency is set out in RAP 15.2(b) and (c):

(b) Action by the Trial Court. In written findings and after a hearing, if circumstances warrant, the trial court shall determine the indigency, if any, of the party seeking review at public expense and

(1) shall grant the motion for an order of indigency if the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses for appellate review of:

(a) criminal prosecutions ... meeting the requirements of RCW 10.73.150. . .

, . . .

(c) Other cases. In cases not governed by subsection (b) of this rule, the trial court shall determine in written findings the indigency, if any, of the party seeking review.

In cases governed by subsection (c), the trial court is limited to entering findings of indigency. RAP 15.2(c)(2). The Supreme Court will then determine whether an order of indigency should be entered. RAP 15.2(d).

Under these rules, the proper procedure depends on resolution of the issue discussed above: whether RCW 10.73.150

authorizes the appointment of counsel at public expense. If it does, RAP 15.2(b)(1)(a) authorizes the trial court to enter an order of indigency. On the other hand, if RCW 10.73.150 does not authorize appointment of counsel, this case falls outside any of the categories set out in RAP 15.2(b). In that situation, the trial court is only authorized to enter findings of indigency and submit them to the Supreme Court for action.

As discussed above, RCW 10.73.150 does not authorize appointment of counsel in DNA testing proceedings. Such proceedings are governed by RCW 10.73.170, which does not allow appointed counsel on appeal. As a result, the trial court here followed the proper procedure in entering findings of indigency and submitting them to the Supreme Court.

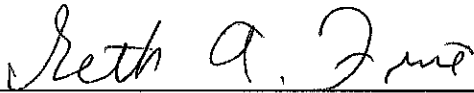
IV. CONCLUSION

The order denying DNA testing should be affirmed. Because Thompson was not entitled to appointed counsel on appeal, he should be required to reimburse the Indigent Appeals Fund for the costs of that appointment. For the guidance of future courts, this court should hold that in an appeal from an order denying post-conviction DNA testing, trial courts should enter

findings of indigency in accordance with RAP 15.2(c).

Respectfully submitted on October 20, 2009.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: 
SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDICES

Appendix A – Order Denying Motion for DNA Testing
(1 CP 44-45)

Appendix B – Statement of Bobby Thompson (1 CP 75-76)

Appendix C – House Bill 2872 (2004)

Appendix D – Substitute House Bill 2872 (2004)

Appendix E – House Bill Report on HB 2872 (2004)

Appendix F – Fiscal Note on HB 2872 (2004)

Appendix G – House Bill 1014 (2005)

Appendix H – Substitute House Bill 1014 (2005)

Appendix J – House Bill Report on SHB 1014 (2005)

Appendix K – Fiscal Note on HB 1014 (2005)



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FILED

06 NOV 30 PM 2:20

PAT L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

BOBBY R. THOMPSON,

Defendant.

No. 95-1-00539-4

ORDER DENYING MOTION
FOR DNA TESTING

This matter came before the court for consideration of the defendant's motion for DNA testing pursuant to RCW 10.73.170. The court has considered the motion, the State's response, and the evidence introduced at trial.

Being fully advised, the court hereby DENIES the motion for the following reasons:

1. As the evidence has been destroyed, there is nothing that can be tested.
2. The defendant has failed to satisfy RCW 10.73.170(2)(a). There has been no showing that DNA technology was unavailable at the time of trial, or that current technology is significantly more accurate or would provide significant new information.

ORIGINAL

AB
89


4. The defendant has failed to satisfy RCW 10.73.170(3). There is no likelihood that the DNA evidence would demonstrate the defendant's innocence.

Entered this 27 day of November, 2006.



HON. GERALD L. KNIGHT, Judge

Presented by:



SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney



LYNNWOOD POLICE DEPARTMENT INCIDENT STATEMENT FORM

Case # 95-3236

Name THOMPSON, BOBBY R Date of Birth 12-6-53 SS # [REDACTED]
 Last First Middle Initial
 Address [REDACTED] City/State/Zip [REDACTED]
 Home Phone [REDACTED] Work Phone [REDACTED] Dr. Lic. # [REDACTED]

The following is my voluntary statement regarding this police report:

I'M LEAVING THE BAR OVER THERE BY THE HOTEL ROOM. I WAS DRINKING WITH SOME FRIENDS. I STARTED OUT THE DOOR AND THIS LADY APPROACHED ME. TO ME IT WAS JUST A HOOKER, I DON'T KNOW. I TELL HER I'M LEAVING AND SHE SAID LET'S GO. I SAID OK. WE GO OUT THE DOOR, ACROSS THE STREET AND INTO THE HOTEL PARKING LOT. SHE MUST HAVE FALLEN 5 TIMES. SHE FELL INTO THE BACK OF A CAR AND BETWEEN 2 CARS. I GOT HER UP AND WE WALKED INTO THE LOBBY. WE PASSED ONE OF MY COWORKERS. ~~WE~~ WE WENT DOWN TO MY ROOM # 111. WE WENT IN AND I SET HER DOWN TO TALK TO HER ABOUT WHAT SHE WANTED TO DO. SHE SAID SHE WAS TIRED OF PEOPLE HURTING HER AND SHE WANTED TO MAKE A PHONE CALL. I TRIED TO HELP HER DIAL BUT SHE DIDN'T WANT ME TO. I SAID WHY DON'T YOU SLEEP IT OFF. I'LL SLEEP HERE. I HAVE TO GET UP IN THE MORNING AND GO FISHING. THERE IS 2 BEDS. I SLEEP IN THE FURTHESTONE FROM THE DOOR. I GAVE HER THE OTHER BED. SHE STARTED TALKING ABOUT MAKING OUT AND STARTED TALKING ABOUT HER BABY. I TOLD HER TO MAKE A CALL TO WHO SHE NEEDS TO. SHE SAID SHE NEEDED FORTY DOLLARS. I SAID I DON'T PAY FOR IT. I TRIED TO HELP HER MAKE A CALL AGAIN BUT SHE STARTED FOOLING AROUND. I GOT UNDRESSED. I TOOK MY PANTS OFF. SHE'S FOOLING AROUND AND PLAYING WITH MY PENIS AND PRIVATE. WE KISSED AND SHE STARTED ACTING CRAZY. SHE SCRATCHED ME THEN ASKED WHY I HURT HER. I SAID I DIDN'T DO ANYTHING OR HURT YOU. SHE STARTED KISSING AND PLAYING AROUND SOME MORE. I LOOKED DOWN AND SAID YOU DONE AROUSED ME. NOW I GUESS WE GOT TO SCREW. SHE TOOK HER PANTS OFF AND SAT DOWN ON TOP OF ME. I CLIMAXED IMMEDIATELY. THATS WHEN SHE GRABBED ANOOL OF ME AND I HIT HER. I HIT HER WITH THE BACK OF MY OPEN RIGHT HAND ACROSS HER FACE. SHE LET GO. I ASKED IF SHE WAS

I certify (or declare) under penalty of perjury under the laws of the State of Washington the above statement is true and accurate.

Date 4-14-95 Signature Bobby R Thompson Witness [REDACTED]

Location LPD

P6/826 21-125 Rev. 4/91

LYNNWOOD POLICE DEPARTMENT
INCIDENT STATEMENT FORM

Case # 95-3236

Name THOMPSON, BOBBY R Date of Birth 12-6-53 SS # [REDACTED]
Last First Middle Initial
Address [REDACTED] City/State/Zip [REDACTED]
Home Phone [REDACTED] Work Phone [REDACTED] Dr. Lic. # [REDACTED]

The following is my voluntary statement regarding this police report:

CRAZY OR WHAT. FROM THAT POINT IT WAS LIKE MOSTLY WORDS AND
ARGUING ABOUT WHAT SHE WANTED. ONE MINUTE SHE WOULD BE
SCREAMING SOMETHING ABOUT KILLING HER. THEN I TOLD HER TO GET
HER CLOTHES AND GET OUT MY DOOR. SHE PICKED UP HER CLOTHES
AND SAID SHE WANTED TO LOVE ME LIKE I'VE NEVER BEEN LOVED
BEFORE. SHE STARTED SAYING I WAS GONNA KILL HER AGAIN.
SHE STARTED SCREAMING HELP ME. THAT'S BASICALLY IT. WE
WENT OUT THE DOOR AND THE POLICE WERE THERE. SHE ALREADY
HAD A BIG BRUISE UNDER HER LEFT EYE AND HER LIP WAS BLEEDING.
SHE SAID SHE HAD BEEN WITH TWO OTHER GUYS. I DIDN'T ASK IF IT
WAS THOSE TWO GUYS THAT BEAT HER UP. THIS STATEMENT WAS
WRITTEN FOR ME BY OFFICER RIDER AS I TOLD IT TO HIM. IT IS
A TRUE AND ACCURATE STATEMENT.

X Bobby R ThompsonI certify (or declare) under penalty of perjury under the laws of the State of Washington
the above statement is true and accurate.Date 4-14-95 Signature Bobby R Thompson Witness [Signature] 609Location LPD

P6/026 21-128 Rev. 4/91

HOUSE BILL 2872

State of Washington

58th Legislature

2004 Regular Session

By Representatives Darneille, Pettigrew, O'Brien, Kagi, Simpson, G.,
Dickerson and Wallace

Read first time 01/21/2004. Referred to Committee on Criminal
Justice & Corrections.

1 AN ACT Relating to DNA testing; and amending RCW 10.73.170.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

3 **Sec. 1.** RCW 10.73.170 and 2003 c 100 s 1 are each amended to read
4 as follows:

5 (1) ~~((On or before December 31, 2004, a person in this state who~~
6 ~~has been convicted of a felony and is currently serving a term of~~
7 ~~imprisonment and who has been denied postconviction DNA testing may~~
8 ~~submit a request to the state Office of Public Defense, which will~~
9 ~~transmit the request to the county prosecutor in the county where the~~
10 ~~conviction was obtained for postconviction DNA testing, if DNA evidence~~
11 ~~was not admitted because the court ruled DNA testing did not meet~~
12 ~~acceptable scientific standards or DNA testing technology was not~~
13 ~~sufficiently developed to test the DNA evidence in the case. On and~~
14 ~~after January 1, 2005, a person must raise the DNA issues at trial or~~
15 ~~on appeal.~~

16 ~~(2) The prosecutor shall screen the request. The request shall be~~
17 ~~reviewed based upon the likelihood that the DNA evidence would~~
18 ~~demonstrate innocence on a more probable than not basis. The~~
19 ~~prosecutor shall inform the requestor and the state Office of Public~~

1 ~~Defense of the decision, and shall, in the case of an adverse decision,~~
2 ~~advise the requestor of appeals rights. Upon determining that testing~~
3 ~~should occur and the evidence still exists, the prosecutor shall~~
4 ~~request DNA testing by the Washington state patrol crime laboratory.~~
5 ~~Contact with victims shall be handled through victim/witness divisions.~~

6 ~~(3) A person denied a request made pursuant to subsections (1) and~~
7 ~~(2) of this section has a right to appeal his or her request within~~
8 ~~thirty days of denial of the request by the prosecutor. The appeal~~
9 ~~shall be to the attorney general's office. If the attorney general's~~
10 ~~office determines that it is likely that the DNA testing would~~
11 ~~demonstrate innocence on a more probable than not basis, then the~~
12 ~~attorney general's office shall request DNA testing by the Washington~~
13 ~~state patrol crime laboratory.~~

14 ~~(4) Notwithstanding any other provision of law, any biological~~
15 ~~material that has been secured in connection with a criminal case prior~~
16 ~~to July 22, 2001, may not be destroyed before January 1, 2005.))~~ A
17 person convicted of a felony in a Washington state court who currently
18 is serving a term of imprisonment may submit to the court that entered
19 the judgment of conviction a verified written motion requesting DNA
20 testing.

21 (2) The motion shall:

22 (a) State that:

23 (i) The court ruled that DNA testing did not meet acceptable
24 scientific standards; or

25 (ii) DNA testing technology was not sufficiently developed to test
26 the DNA evidence in the case; or

27 (iii) The DNA testing now requested would be significantly more
28 accurate than prior DNA testing or would provide significant new
29 information;

30 (b) Explain why DNA evidence is material to the identity of the
31 perpetrator of, or accomplice to, the crime, or to sentence
32 enhancement; and

33 (c) Comply with all other procedural requirements established by
34 court rule.

35 (3) The court shall grant a motion requesting DNA testing under
36 this section if such motion is in the form required by subsection (2)
37 of this section, and the convicted person has demonstrated on a more

1 probable than not basis that the proposed DNA testing would provide
2 substantial new evidence related to the identity of the perpetrator of,
3 or accomplice to, the crime, or to sentence enhancement.

4 (4) Upon written request to the court that entered a judgment of
5 conviction, a convicted person who demonstrates that he or she is
6 indigent under RCW 10.101.010 may request appointment of counsel solely
7 to prepare and present a motion under this section, and the court, in
8 its discretion, may grant the request. Such motion for appointment of
9 counsel shall comply with all procedural requirements established by
10 court rule.

11 (5) DNA testing ordered under this section shall be performed by
12 the Washington state patrol crime laboratory. Contact with victims
13 shall be handled through victim/witness divisions.

14 (6) Notwithstanding any other provision of law, any biological
15 material that has been secured in connection with a criminal case, or
16 evidence samples sufficient for testing, shall not be destroyed before
17 the date of the convicted person's release from custody or twenty years
18 from the date of conviction, whichever occurs first.

--- END ---

SUBSTITUTE HOUSE BILL 2872

State of Washington

58th Legislature

2004 Regular Session

By House Committee on Criminal Justice & Corrections (originally sponsored by Representatives Darneille, Pettigrew, O'Brien, Kagi, G. Simpson, Dickerson and Wallace)

READ FIRST TIME 02/06/04.

1 AN ACT Relating to DNA testing; and amending RCW 10.73.170.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

3 Sec. 1. RCW 10.73.170 and 2003 c 100 s 1 are each amended to read
4 as follows:

5 ~~(1) ((On or before December 31, 2004, a person in this state who~~
6 ~~has been convicted of a felony and is currently serving a term of~~
7 ~~imprisonment and who has been denied postconviction DNA testing may~~
8 ~~submit a request to the state Office of Public Defense, which will~~
9 ~~transmit the request to the county prosecutor in the county where the~~
10 ~~conviction was obtained for postconviction DNA testing, if DNA evidence~~
11 ~~was not admitted because the court ruled DNA testing did not meet~~
12 ~~acceptable scientific standards or DNA testing technology was not~~
13 ~~sufficiently developed to test the DNA evidence in the case. On and~~
14 ~~after January 1, 2005, a person must raise the DNA issues at trial or~~
15 ~~on appeal.~~

16 ~~(2) The prosecutor shall screen the request. The request shall be~~
17 ~~reviewed based upon the likelihood that the DNA evidence would~~
18 ~~demonstrate innocence on a more probable than not basis. The~~
19 ~~prosecutor shall inform the requestor and the state Office of Public~~

1 ~~Defense of the decision, and shall, in the case of an adverse decision,~~
2 ~~advise the requester of appeals rights. Upon determining that testing~~
3 ~~should occur and the evidence still exists, the prosecutor shall~~
4 ~~request DNA testing by the Washington state patrol crime laboratory.~~
5 ~~Contact with victims shall be handled through victim/witness divisions.~~

6 ~~(3) A person denied a request made pursuant to subsections (1) and~~
7 ~~(2) of this section has a right to appeal his or her request within~~
8 ~~thirty days of denial of the request by the prosecutor. The appeal~~
9 ~~shall be to the attorney general's office. If the attorney general's~~
10 ~~office determines that it is likely that the DNA testing would~~
11 ~~demonstrate innocence on a more probable than not basis, then the~~
12 ~~attorney general's office shall request DNA testing by the Washington~~
13 ~~state patrol crime laboratory.~~

14 ~~(4) Notwithstanding any other provision of law, any biological~~
15 ~~material that has been secured in connection with a criminal case prior~~
16 ~~to July 22, 2001, may not be destroyed before January 1, 2005.))~~ A
17 person convicted of a felony in a Washington state court who currently
18 is serving a term of imprisonment may submit to the court that entered
19 the judgment of conviction a verified written motion requesting DNA
20 testing.

21 (2) The motion shall:

22 (a) State that:

23 (i) The court ruled that DNA testing did not meet acceptable
24 scientific standards; or

25 (ii) DNA testing technology was not sufficiently developed to test
26 the DNA evidence in the case; or

27 (iii) The DNA testing now requested would be significantly more
28 accurate than prior DNA testing or would provide significant new
29 information;

30 (b) Explain why DNA evidence is material to the identity of the
31 perpetrator of, or accomplice to, the crime, or to sentence
32 enhancement; and

33 (c) Comply with all other procedural requirements established by
34 court rule.

35 (3) The court shall grant a motion requesting DNA testing under
36 this section if such motion is in the form required by subsection (2)
37 of this section, and the convicted person has shown the likelihood that

1 the DNA evidence would demonstrate innocence on a more probable than
2 not basis.

3 (4) Upon written request to the court that entered a judgment of
4 conviction, a convicted person who demonstrates that he or she is
5 indigent under RCW 10.101.010 may request appointment of counsel solely
6 to prepare and present a motion under this section, and the court, in
7 its discretion, may grant the request. Such motion for appointment of
8 counsel shall comply with all procedural requirements established by
9 court rule.

10 (5) DNA testing ordered under this section shall be performed by
11 the Washington state patrol crime laboratory. Contact with victims
12 shall be handled through victim/witness divisions.

13 (6) Notwithstanding any other provision of law, upon motion of
14 defense counsel or the court's own motion, a sentencing court in a
15 felony case may order the preservation of any biological material that
16 has been secured in connection with a criminal case, or evidence
17 samples sufficient for testing. The court must specify the samples to
18 be maintained and the length of time the samples must be preserved.

--- END ---

HOUSE BILL REPORT

HB 2872

As Reported by House Committee On:
Criminal Justice & Corrections

Title: An act relating to DNA testing.

Brief Description: Revising DNA testing provision.

Sponsors: Representatives Darneille, Pettigrew, O'Brien, Kagi, Simpson, G., Dickerson and Wallace.

Brief History:

Committee Activity:

Criminal Justice & Corrections: 2/4/04, 2/6/04 [DPS].

Brief Summary of Substitute Bill

- Changes provisions governing post-conviction deoxyribonucleic acid (DNA) testing to allow convicted felons to petition the court directly rather than submit requests to the prosecutor and the Office of the Attorney General.
- Sets new standards for retaining biological material secured in connection with a crime.
- Removes the December 31, 2004 termination date.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Mielke, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kagi, Pearson and Veloria.

Staff: Sarah Shirey (Jim Morishima 786-7191).

Background:

Post-Conviction DNA Testing

Until January 1, 2005, incarcerated felons who have been denied post-conviction DNA testing may request DNA testing if the DNA evidence was not admitted at his or her trial because: (1) the court ruled that DNA testing did not meet acceptable scientific standards, or (2) DNA testing technology was not sufficiently developed to test the DNA evidence in the case.

The state Office of Public Defense will make the request on behalf of the felon to the prosecutor's office in the county where the conviction was obtained. The prosecutor must determine whether the evidence still exists, and whether it is "more probable than not" that the DNA evidence would demonstrate innocence. The prosecutor must submit its decision to the requestor and the state Office of Public Defense.

If the prosecutor determines that testing should occur, the prosecutor must request DNA testing by the Washington State Patrol Crime Laboratory (WSPCL). In the case of an adverse decision, the prosecutor must advise the requestor about his or her appeal rights. Any denial for post-conviction DNA testing, may be appealed within 30 days of the denial. The appeal is requested to the Office of the Attorney General. If that office determines that DNA testing is likely to demonstrate innocence on a more probable than not basis, it must request DNA testing by the WSPCL.

On or after January 1, 2005, a person must raise DNA issues at trial or on appeal.

Preservation of Biological Material

Biological material secured in connection with a criminal case prior to July 22, 2001, may not be destroyed before January 1, 2005.

Summary of Substitute Bill:

Post-Conviction DNA Testing

The existing post-conviction DNA testing request process is eliminated. The new process allows incarcerated felons to submit a motion to the court where he or she was convicted for post-conviction DNA testing. The motion must: (1) state that DNA testing did not meet acceptable scientific standards or was not sufficiently developed to test the DNA evidence in the case, or that the DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information; (2) explain why the DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and (3) comply with all other procedural requirements established by court rule.

The court must grant the motion for DNA testing if it determines that the DNA evidence would demonstrate innocence on a more probable than not basis. If ordered by the court, DNA testing will be performed by the WSPCL. Contact with witnesses must be handled through victim/witness divisions.

If a convicted person demonstrates to the court that he or she is indigent, the court may, in its discretion, appoint counsel to prepare and present a motion for post-conviction DNA testing.

Preservation of Biological Material

Upon motion by the defense counsel or the court's own motion, the sentencing court in a felony case may order the preservation of biological material secured in connection with a criminal case, or evidence samples sufficient for testing. The court must specify the samples to be maintained and the length of time the samples must be preserved.

Termination Date

The existing December 31, 2004 termination date is eliminated and not replaced.

Substitute Bill Compared to Original Bill:

The substitute bill changes the standard for granting a motion for post-conviction DNA testing to a more probable than not likelihood that the DNA evidence would demonstrate innocence. In addition, the substitute changes the procedures for preservation of biological material to require a motion by the defense counsel or the court. The sentencing court may determine whether to preserve the material and specify the length of time samples are to be maintained.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (In support of substitute bill) This legislation is necessary because current provisions governing post-conviction DNA testing terminate at the end of this year. Although it is best if DNA evidence is presented at trial, due to cost, DNA testing is not always done. This legislation helps ensure that a process remains in place for cases where DNA tests could provide evidence of a person's innocence. Although the prosecutor's office has been reviewing these cases for the past three years, decisions about DNA testing should be determined by the court. There have only been 35 requests state-wide for post-conviction DNA testing over the past two years. By keeping the high "proof of innocence" standard in the bill, the number of requests will remain low and testing will only be ordered in cases where there is a credible showing that it likely could benefit an innocent person.

Testimony Against: None.

Persons Testifying: (In support) Representative Darneille, prime sponsor; Joanne Moore, Russ Aoki, and Mary Jane Ferguson, Office of Public Defense.

(In support of substitute bill) Tom McBride, Washington Association of Prosecuting Attorneys; and Tim Schellberg, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: None.

Multiple Agency Fiscal Note Summary

Bill Number: 2872 HB	Title: DNA testing
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Estimated Cash Receipts

Agency Name	2003-05		2005-07		2007-09	
	GF- State	Total	GF- State	Total	GF- State	Total
Total \$						

Local Gov. Courts *						
Local Gov. Other **						
Local Gov. Total						

Estimated Expenditures

Agency Name	2003-05			2005-07			2007-09		
	FTEs	GF-State	Total	FTEs	GF-State	Total	FTEs	GF-State	Total
Office of Administrator for the Courts	.0	8,682	8,682	.1	17,364	17,364	.1	17,364	17,364
Office of Public Defense	.0	0	8,400	.0	0	16,800	.0	0	16,800
Washington State Patrol	.3	18,700	18,700	.5	17,400	17,400	.5	17,400	17,400
Department of Corrections	.0	0	0	.0	0	0	.0	0	0
Total	0.3	\$27,382	\$35,782	0.6	\$34,764	\$51,564	0.6	\$34,764	\$51,564

Local Gov. Courts *	.3		101,871	.7		109,408	.7		109,408
Local Gov. Other **	Non-zero but indeterminate cost. Please see discussion.								
Local Gov. Total	.3		101,871	.7		109,408	.7		109,408

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Prepared by: Garry Austin, OFM	Phone: 360-902-0564	Date Published: Final 2/ 4/2004
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* See Office of the Administrator for the Courts judicial fiscal note

** See local government fiscal note

APPENDIX F

Judicial Impact Fiscal Note

Bill Number: 2872 HB	Title: DNA testing	Agency: 055-Office of Administrator for Courts
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Part I: Estimates

☐ No Fiscal Impact

Estimated Cash Receipts to:

FUND	FY 2004	FY 2005	2003-05	2005-07	2007-09
Counties					
Cities					
Total \$					

Estimated Expenditures from:

STATE	FY 2004	FY 2005	2003-05	2005-07	2007-09
State FTE Staff Years		.1		.1	.1
Fund					
General Fund-State 001-1		8,682	8,682	17,364	17,364
State Subtotal \$		8,682	8,682	17,364	17,364
COUNTY	FY 2004	FY 2005	2003-05	2005-07	2007-09
County FTE Staff Years		.7	.3	.7	.7
Fund					
Local - Counties		101,871	101,871	109,408	109,408
Counties Subtotal \$		101,871	101,871	109,408	109,408
CITY	FY 2004	FY 2005	2003-05	2005-07	2007-09
City FTE Staff Years					
Fund					
Local - Cities					
Cities Subtotal \$					
Local Subtotal \$		101,871	101,871	109,408	109,408
Total Estimated Expenditures \$		110,553	110,553	126,772	126,772

The revenue and expenditure estimates on this page represent the most likely fiscal impact. Responsibility for expenditures may be subject to the provisions of RCW 43.135.060.

Check applicable boxes and follow corresponding instructions:

- ☒ If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- ☐ If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- ☒ Capital budget impact, complete Part IV.

Legislative Contact:	Phone:	Date: 01/28/2004
Agency Preparation: Yvonne Pettus	Phone: (360) 705-5314	Date: 01/28/2004
Agency Approval: Janet McLane	Phone: (360) 705-5305	Date: 01/30/2004
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 01/30/2004

Request # 1002-1

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact on the Courts

This bill allows a person convicted of a felony to make a motion to the superior court in which he or she was convicted requesting DNA testing. The superior court must rule on the motion and may grant an offender's request for court-appointed counsel.

II. B - Cash Receipts Impact

II. C - Expenditures

According to the Office of Public Defense (OPD), in the past three years, there have been 25 requests for DNA testing. OPD estimated in the future, there will be fewer than 10 requests per year.

It is estimated, that hearings for these cases would require 2 days. Based on 10 cases per year, the judicial time required would be the equivalent of 0.1 new superior court judges. The increase of 0.1 new superior court judges would result in a need for 0.24 administrative staff and 0.39 county clerk staff. The state pays 50 percent of the judges' salary and 100 percent of the judges' benefits. The state's portion for FY 05 would be \$8,682. The counties' portion of the judges' salary would be \$6,610.

Based on 2002 data from the State Auditor's office, the salary and benefit costs for superior court staff would be \$11,334 and for county clerk staff the salary and benefit costs would be \$17,583. The superior court operational costs would be \$16,864 and the county clerk operational costs would be \$2,312.

An additional cost that could potentially be quite high is for expert witnesses. These costs should be reflected in the fiscal note for local government.

Part III: Expenditure Detail

III. A - Expenditure By Object or Purpose (State)

State	FY 2004	FY 2005	2003-05	2005-07	2007-09
FTE Staff Years		.1		.1	.1
Salaries and Wages		6,610	6,610	13,220	13,220
Employee Benefits		2,071	2,071	4,142	4,142
Personal Service Contracts					
Goods and Services					
Travel					
Capital Outlays					
Inter Agency/Fund Transfers					
Grants, Benefits & Client Services					
Debt Service					
Interagency Reimbursements					
Intra-Agency Reimbursements					
Total \$		8,681	8,681	17,362	17,362

III. B - Expenditure By Object or Purpose (County)

County	FY 2004	FY 2005	2003-05	2005-07	2007-09
FTE Staff Years		.7	.3	.7	.7
Salaries & Benefits		35,528	35,528	71,056	71,056
Capital		47,167	47,167		
Other		19,176	19,176	38,352	38,352
Total \$		101,871	101,871	109,408	109,408

III. C - Expenditure By Object or Purpose (City)

City	FY 2004	FY 2005	2003-05	2005-07	2007-09
FTE Staff Years					
Total \$					

III. D - FTE Detail

Job Classification	Salary	FY 2004	FY 2005	2003-05	2005-07	2007-09
County Clerk Staff	44,718		0.4	0.2	0.4	0.4
Superior Court Admin Staff	46,373		0.2	0.1	0.2	0.2
Superior Court Judge	124,410		0.1	0.1	0.1	0.1
Total FTE's			0.8	0.4	0.8	0.8

Part IV: Capital Budget Impact

Identify acquisition and construction costs not reflected elsewhere on the fiscal note and describe potential financing methods

Construction Estimate	FY 2004	FY 2005	2003-05	2005-07	2007-09
Acquisition					
Construction					
Other		47,167	47,167		
Total \$		47,167	47,167		

For every new superior court judge, 1,970 square feet are needed. For every clerical position, 120 square feet are needed. The cost per square foot is estimated by Capital Budget staff to be \$165. Therefore, the cost for this bill would be \$47,167.

Individual State Agency Fiscal Note

Revised

Bill Number: 2872 HB	Title: DNA testing	Agency: 056-Office of Public Defense
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Part I: Estimates

☐ No Fiscal Impact

Estimated Cash Receipts to:

FUND					
Total \$					

Estimated Expenditures from:

	FY 2004	FY 2005	2003-05	2005-07	2007-09
Fund					
Public Safety and Education	0	8,400	8,400	16,800	16,800
Account-State 02V-1					
Total \$	0	8,400	8,400	16,800	16,800

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- ☐ If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- ☒ If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- ☐ Capital budget impact, complete Part IV.
- ☐ Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 01/28/2004
Agency Preparation: Mary Jane Ferguson	Phone: 360-956-2110	Date: 01/29/2004
Agency Approval: Joanne Moore	Phone: 360 956-2107	Date: 01/29/2004
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 01/29/2004

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

The trial court may consider appointment of counsel to assist in preparation of this motion. Based on ten cases per year, it is expected that inmates requesting DNA testing would request appointment of counsel, but that the trial courts would evaluate the inmates' requests and would exercise their discretion to appoint counsel in an estimated seven out of ten cases per year. Since this is a post conviction appointment similar to appointment of counsel in a personal restraint petition case, it is assumed that the state would pay for counsel through the Office of Public Defense at a rate of approximately \$1,200 per case. This would be a cost of \$8,400 per year.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.

Part III: Expenditure Detail

III. A - Expenditures by Object Or Purpose

	FY 2004	FY 2005	2003-05	2005-07	2007-09
FTE Staff Years					
A-Salaries and Wages					
B-Employee Benefits					
C-Personal Service Contracts					
E-Goods and Services					
G-Travel					
J-Capital Outlays					
M-Inter Agency/Fund Transfers					
N-Grants, Benefits & Client Services		8,400	8,400	16,800	16,800
P-Debt Service					
S-Interagency Reimbursements					
T-Intra-Agency Reimbursements					
Total:	\$0	\$8,400	\$8,400	\$16,800	\$16,800

Part IV: Capital Budget Impact

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

Individual State Agency Fiscal Note

Bill Number: 2872 HB	Title: DNA testing	Agency: 225-Washington State Patrol
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Part I: Estimates

☐ No Fiscal Impact

Estimated Cash Receipts to:

FUND					
Total \$					

Estimated Expenditures from:

	FY 2004	FY 2005	2003-05	2005-07	2007-09
FTE Staff Years	0.0	0.5	0.3	0.5	0.5
Fund					
General Fund-State 001-1	0	18,700	18,700	17,400	17,400
Total \$	0	18,700	18,700	17,400	17,400

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- ☐ If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- ☒ If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- ☐ Capital budget impact, complete Part IV.
- ☐ Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 01/28/2004
Agency Preparation: Heidi Thomsen	Phone: (360) 753-0626	Date: 01/28/2004
Agency Approval: Sally Hunter	Phone: 360-753-0247	Date: 01/28/2004
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 01/29/2004

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

The 2000 Legislature enacted Substitute House Bill 2491 (Chapter 92, Laws of 2000) which allowed for postconviction deoxyribonucleic acid (DNA) testing of evidence related to cases of persons sentenced to death or life imprisonment without possibility of release. During the 2001 Legislature, SSB 5896 (Chapter 301, Laws of 2001) was enacted and allowed for DNA testing of evidence related to cases of persons who were convicted of a felony and are currently serving a term of imprisonment. In addition, it extended a one-time eligibility for DNA testing to all felons imprisoned on or before December 31, 2004 who were denied postconviction DNA testing.

The 2003 Legislature enacted House Bill 1391 which required persons requesting postconviction DNA testing to submit their request to the state Office of Public Defense who would transmit the request to the appropriate county prosecutor. The prosecutor was responsible for accepting or denying the request.

House Bill 2872 amends the 2003 legislation to allow for any person convicted of a felony in Washington state who is currently serving a term of life imprisonment to submit to the court a request for DNA testing, provided that:

- the court ruled that DNA testing did not meet acceptable scientific standards; or
- DNA testing technology was not sufficiently developed to test DNA evidence in the case; or
- DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information.

The court shall grant a motion requesting DNA testing if the convicted person has demonstrated that the proposed DNA testing would provide substantial new evidence related to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement. DNA testing shall be performed by the Washington State Patrol Crime Laboratory. Any biological material secured in connection with a criminal case or evidence samples sufficient for testing shall not be destroyed prior to the convicted person's release or twenty years from the date of conviction, whichever occurs first.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

None.

II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.

The Washington State Patrol's Crime Laboratory Division estimates that as a result of HB 2872 there will be approximately 24 DNA criminal cases submitted each year. Since one fully trained forensic scientist could process about 55 DNA criminal cases each year (there is currently a six-month time lag between hiring a scientist and providing the additional training and validation to meet national DNA analysis guidelines), the Patrol would need one-half FTE to perform the work required under this bill.

In the 2001-03 Biennium, the Patrol received an appropriation of \$100,000 (SSB 5896) for postconviction DNA testing of evidence related to cases of persons sentenced to death or life imprisonment without the possibility of release. This appropriation was spent on overtime and DNA kits. The estimated cost for the .5 FTE to process 24 cases for FY 2005 is \$68,700 and \$117,400 per biennium in the future. The agency is requesting the difference between the total estimated annual cost and the \$50,000 per fiscal year that is currently in the Crime Laboratory's budget. (The agency assumes that since SB 6447 removes the expiration date for postconviction testing (December 31, 2004), these funds will carry forward

to subsequent biennia.)

If the number of postconviction DNA cases increases beyond the estimated 24 cases per year, the agency will submit a decision package through the regular budget process to cover the additional costs.

Part III: Expenditure Detail

III. A - Expenditures by Object Or Purpose

	FY 2004	FY 2005	2003-05	2005-07	2007-09
FTE Staff Years		0.50	0.3	0.5	0.5
A-Salaries and Wages		7,000	7,000	14,000	14,000
B-Employee Benefits		1,700	1,700	3,400	3,400
C-Personal Service Contracts					
E-Goods and Services					
G-Travel					
J-Capital Outlays		10,000	10,000		
M-Inter Agency/Fund Transfers					
N-Grants, Benefits & Client Services					
P-Debt Service					
S-Interagency Reimbursements					
T-Intra-Agency Reimbursements					
Total:	\$0	\$18,700	\$18,700	\$17,400	\$17,400

III. B - Detail: List FTEs by classification and corresponding annual compensation. Totals need to agree with total FTEs in Part I and Part IIIA

Job Classification	Salary	FY 2004	FY 2005	2003-05	2005-07	2007-09
Forensic Scientist 3	60,180		0.5	0.3	0.5	0.5
Total FTE's			0.5	0.3	0.5	0.5

Part IV: Capital Budget Impact

None.

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

None.

Individual State Agency Fiscal Note

Bill Number: 2872 HB	Title: DNA testing	Agency: 310-Department of Corrections
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Part I: Estimates

☒ No Fiscal Impact

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- ☐ If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- ☐ If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- ☐ Capital budget impact, complete Part IV.
- ☐ Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 01/28/2004
Agency Preparation: Joyce Miller	Phone: 360-664-0802	Date: 01/28/2004
Agency Approval: Tracy Guerin	Phone: 360-753-1158	Date: 02/03/2004
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 02/04/2004

LOCAL GOVERNMENT FISCAL NOTE

Department of Community, Trade and Economic Development

Bill Number: 2872 HB	Title: DNA testing
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Part I: Jurisdiction-Location, type or status of political subdivision defines range of fiscal impacts.

Legislation Impacts:

- ☒ Cities:
- ☒ Counties:
- ☐ Special Districts:
- ☐ Specific jurisdictions only:
- ☐ Variance occurs due to:

Part II: Estimates

- ☐ No fiscal impacts.
- ☐ Expenditures represent one-time costs:
- ☐ Legislation provides local option:
- ☒ Key variables cannot be estimated with certainty at this time: Volume of evidence involved; possible need to remodel and/or build new property rooms; space consumption of existing and future pieces of evidence; cost of continued auditing and handling of evidence stored in property rooms.

Estimated revenue impacts to:

Jurisdiction	FY 2004	FY 2005	2003-05	2005-07	2007-09
City					
County					
Special District					
TOTAL \$					
GRAND TOTAL \$					

Estimated expenditure impacts to:

Indeterminate Impact

Part III: Preparation and Approval

Fiscal Note Analyst: Sara Battin	Phone: 360-725-5038	Date: 01/28/2004
Leg. Committee Contact:	Phone:	Date: 01/28/2004
Agency Approval: Louise Deng Davis	Phone: (360) 725-5034	Date: 02/02/2004
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 02/03/2004

Part IV: Analysis

A. SUMMARY OF BILL

Provide a clear, succinct description of the bill with an emphasis on how it impacts local government.

This bill grants persons convicted of a felony the right to make a motion to the convicting superior court requesting DNA testing of evidence. Evidence must be stored by local law enforcement for either 20 years after conviction or until the date of release, whichever comes first.

B. SUMMARY OF EXPENDITURE IMPACTS

Briefly describe and quantify the expenditure impacts of the legislation on local governments, identifying the expenditure provisions by section number, and when appropriate, the detail of expenditures. Delineate between city, county and special district impacts.

HB 2872 will fiscally impact local governments cost through the involvement of prosecutors in motions on the request of DNA testing, the need and provision of expert witnesses, the cost of housing the requesting felons and the storage of evidence by local law enforcement agencies. While the cost of storing evidence is uncertain, it is estimated that prosecution costs would be \$4,000 per year, expert witnesses costs would be between \$3,000 and \$12,000 per case and jail bed costs would be \$6,100 per year. (See discussion below for greater detail)

ASSUMPTIONS AND METHODOLOGY:

Number of requests:

According to the Office of Public Defense (OPD), 25 requests have been made for DNA testing in three years. OPD estimates that 10 requests will be made each year in the future.

Hearings:

Defense Costs: OPD would pay for defense counsel, so defense costs are not considered in this note.

Prosecution Costs:

As the cases involved are felonies, the cost of prosecuting the motion would fall to the counties. Using conservative estimations, at least 10 hours of prosecutorial time will be expended preparing for these hearings. Additional time may be required in order to locate victims and/or victim's survivors. Therefore the cost of prosecuting can be estimated at

$$10 \text{ requests} \times (10 \text{ hours} \times \$40 \text{ prosecutor salary}) = \$4,000 \text{ per year}$$

Expert Witness Costs:

It is uncertain to what extent expert witnesses would be needed at the initial hearing, however for those cases where a DNA expert was required the cost would range from \$3,000 to \$12,000 depending on the service provided, distance the expert has to travel and the number of hours the expert works on the case. In cases where the defendant is indigent, the county would pay for this cost.

Court Costs:

Court costs are addressed in the Administrative Office of the Courts' fiscal note.

Jail Costs: Felons will need to be transported from prison to the county jail and housed in the county jail during the proceeding, as transport and hearings rarely occur on the same day. Washington Association of Prosecuting Attorneys estimate felons requesting review will need to be housed in county jails for 10 days, therefore the jail bed costs can be estimated at:

$$10 \text{ requests} \times (10 \text{ days} \times \$61 \text{ per day}) = \$6,100 \text{ per year.}$$

Storage:

Local law enforcement agencies will incur additional costs by having to retain and maintain evidence in their property rooms for twenty years or until the date of release. Due to a number of variables that cannot be quantified, the extent of fiscal impact to these departments is unknown. These factors include the volume of evidence involved, the space such evidence does and will consume, whether additional property rooms will be required or existing property rooms need to be remodeled to hold the involved evidence; the cost of continual auditing, maintenance and retention of the evidence.

SOURCES:

Washington Association of Sheriffs and Police Chiefs

Washington Association of Prosecuting Attorneys

Office of Public Defense

2003 Jail Rate Survey by Yakima County Corrections

2003 Salary and Benefit Survey by Association of Washington Cities

LGFN Survey of County Prosecutors

C. SUMMARY OF REVENUE IMPACTS

Briefly describe and quantify the revenue impacts of the legislation on local governments, identifying the revenue provisions by section number, and when appropriate, the detail of revenue sources. Delineate between city, county and special district impacts.

None.

HOUSE BILL 1014

State of Washington 59th Legislature 2005 Regular Session

By Representatives Darneille, O'Brien, Cody, Morrell, Chase and Schual-Berke

Prefiled 12/23/2004. Read first time 01/10/2005. Referred to Committee on Criminal Justice & Corrections.

1 AN ACT Relating to DNA testing; and amending RCW 10.73.170.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

3 **Sec. 1.** RCW 10.73.170 and 2003 c 100 s 1 are each amended to read
4 as follows:

5 ~~(1) ((On or before December 31, 2004, a person in this state who~~
6 ~~has been convicted of a felony and is currently serving a term of~~
7 ~~imprisonment and who has been denied postconviction DNA testing may~~
8 ~~submit a request to the state Office of Public Defense, which will~~
9 ~~transmit the request to the county prosecutor in the county where the~~
10 ~~conviction was obtained for postconviction DNA testing, if DNA evidence~~
11 ~~was not admitted because the court ruled DNA testing did not meet~~
12 ~~acceptable scientific standards or DNA testing technology was not~~
13 ~~sufficiently developed to test the DNA evidence in the case. On and~~
14 ~~after January 1, 2005, a person must raise the DNA issues at trial or~~
15 ~~on appeal.~~

16 ~~(2) The prosecutor shall screen the request. The request shall be~~
17 ~~reviewed based upon the likelihood that the DNA evidence would~~
18 ~~demonstrate innocence on a more probable than not basis. The~~
19 ~~prosecutor shall inform the requestor and the state Office of Public~~

1 ~~Defense of the decision, and shall, in the case of an adverse decision,~~
2 ~~advise the requestor of appeals rights. Upon determining that testing~~
3 ~~should occur and the evidence still exists, the prosecutor shall~~
4 ~~request DNA testing by the Washington state patrol crime laboratory.~~
5 ~~Contact with victims shall be handled through victim/witness divisions.~~

6 ~~(3) A person denied a request made pursuant to subsections (1) and~~
7 ~~(2) of this section has a right to appeal his or her request within~~
8 ~~thirty days of denial of the request by the prosecutor. The appeal~~
9 ~~shall be to the attorney general's office. If the attorney general's~~
10 ~~office determines that it is likely that the DNA testing would~~
11 ~~demonstrate innocence on a more probable than not basis, then the~~
12 ~~attorney general's office shall request DNA testing by the Washington~~
13 ~~state patrol crime laboratory.~~

14 ~~(4) Notwithstanding any other provision of law, any biological~~
15 ~~material that has been secured in connection with a criminal case prior~~
16 ~~to July 22, 2001, may not be destroyed before January 1, 2005.)) A~~
17 person convicted of a felony in a Washington state court who currently
18 is serving a term of imprisonment may submit to the court that entered
19 the judgment of conviction a verified written motion requesting DNA
20 testing, with a copy of the motion provided to the state office of
21 public defense.

22 (2) The motion shall:

23 (a) State that:

24 (i) The court ruled that DNA testing did not meet acceptable
25 scientific standards; or

26 (ii) DNA testing technology was not sufficiently developed to test
27 the DNA evidence in the case; or

28 (iii) The DNA testing now requested would be significantly more
29 accurate than prior DNA testing or would provide significant new
30 information;

31 (b) Explain why DNA evidence is material to the identity of the
32 perpetrator of, or accomplice to, the crime, or to sentence
33 enhancement; and

34 (c) Comply with all other procedural requirements established by
35 court rule.

36 (3) The court shall grant a motion requesting DNA testing under
37 this section if such motion is in the form required by subsection (2)

1 of this section, and the convicted person has shown the likelihood that
2 the DNA evidence would demonstrate innocence on a more probable than
3 not basis.

4 (4) Upon written request to the court that entered a judgment of
5 conviction, a convicted person who demonstrates that he or she is
6 indigent under RCW 10.101.010 may request appointment of counsel solely
7 to prepare and present a motion under this section, and the court, in
8 its discretion, may grant the request. Such motion for appointment of
9 counsel shall comply with all procedural requirements established by
10 court rule.

11 (5) DNA testing ordered under this section shall be performed by
12 the Washington state patrol crime laboratory. Contact with victims
13 shall be handled through victim/witness divisions.

14 (6) Notwithstanding any other provision of law, upon motion of
15 defense counsel or the court's own motion, a sentencing court in a
16 felony case may order the preservation of any biological material that
17 has been secured in connection with a criminal case, or evidence
18 samples sufficient for testing. The court must specify the samples to
19 be maintained and the length of time the samples must be preserved.

--- END ---

SUBSTITUTE HOUSE BILL 1014

State of Washington

59th Legislature

2005 Regular Session

By House Committee on Criminal Justice & Corrections (originally sponsored by Representatives Darneille, O'Brien, Cody, Morrell, Chase and Schual-Berke)

READ FIRST TIME 01/25/05.

1 AN ACT Relating to DNA testing; amending RCW 10.73.170; and
2 declaring an emergency.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 10.73.170 and 2003 c 100 s 1 are each amended to read
5 as follows:

6 (1) ~~((On or before December 31, 2004, a person in this state who~~
7 ~~has been convicted of a felony and is currently serving a term of~~
8 ~~imprisonment and who has been denied postconviction DNA testing may~~
9 ~~submit a request to the state Office of Public Defense, which will~~
10 ~~transmit the request to the county prosecutor in the county where the~~
11 ~~conviction was obtained for postconviction DNA testing, if DNA evidence~~
12 ~~was not admitted because the court ruled DNA testing did not meet~~
13 ~~acceptable scientific standards or DNA testing technology was not~~
14 ~~sufficiently developed to test the DNA evidence in the case. On and~~
15 ~~after January 1, 2005, a person must raise the DNA issues at trial or~~
16 ~~on appeal.~~

17 ~~(2) The prosecutor shall screen the request. The request shall be~~
18 ~~reviewed based upon the likelihood that the DNA evidence would~~
19 ~~demonstrate innocence on a more probable than not basis. The~~

1 ~~prosecutor shall inform the requestor and the state Office of Public~~
2 ~~Defense of the decision, and shall, in the case of an adverse decision,~~
3 ~~advise the requestor of appeals rights. Upon determining that testing~~
4 ~~should occur and the evidence still exists, the prosecutor shall~~
5 ~~request DNA testing by the Washington state patrol crime laboratory.~~
6 ~~Contact with victims shall be handled through victim/witness divisions.~~

7 ~~(3) A person denied a request made pursuant to subsections (1) and~~
8 ~~(2) of this section has a right to appeal his or her request within~~
9 ~~thirty days of denial of the request by the prosecutor. The appeal~~
10 ~~shall be to the attorney general's office. If the attorney general's~~
11 ~~office determines that it is likely that the DNA testing would~~
12 ~~demonstrate innocence on a more probable than not basis, then the~~
13 ~~attorney general's office shall request DNA testing by the Washington~~
14 ~~state patrol crime laboratory.~~

15 ~~(4) Notwithstanding any other provision of law, any biological~~
16 ~~material that has been secured in connection with a criminal case prior~~
17 ~~to July 22, 2001, may not be destroyed before January 1, 2005.)) A~~
18 person convicted of a felony in a Washington state court who currently
19 is serving a term of imprisonment may submit to the court that entered
20 the judgment of conviction a verified written motion requesting DNA
21 testing, with a copy of the motion provided to the state office of
22 public defense.

23 (2) The motion shall:

24 (a) State that:

25 (i) The court ruled that DNA testing did not meet acceptable
26 scientific standards; or

27 (ii) DNA testing technology was not sufficiently developed to test
28 the DNA evidence in the case; or

29 (iii) The DNA testing now requested would be significantly more
30 accurate than prior DNA testing or would provide significant new
31 information;

32 (b) Explain why DNA evidence is material to the identity of the
33 perpetrator of, or accomplice to, the crime, or to sentence
34 enhancement; and

35 (c) Comply with all other procedural requirements established by
36 court rule.

37 (3) The court shall grant a motion requesting DNA testing under
38 this section if such motion is in the form required by subsection (2)

1 of this section, and the convicted person has shown the likelihood that
2 the DNA evidence would demonstrate innocence on a more probable than
3 not basis.

4 (4) Upon written request to the court that entered a judgment of
5 conviction, a convicted person who demonstrates that he or she is
6 indigent under RCW 10.101.010 may request appointment of counsel solely
7 to prepare and present a motion under this section, and the court, in
8 its discretion, may grant the request. Such motion for appointment of
9 counsel shall comply with all procedural requirements established by
10 court rule.

11 (5) DNA testing ordered under this section shall be performed by
12 the Washington state patrol crime laboratory. Contact with victims
13 shall be handled through victim/witness divisions.

14 (6) The court shall adopt rules for the preservation of all
15 biological material and evidence samples in connection with criminal
16 cases.

17 (7) Notwithstanding any other provision of law, upon motion of
18 defense counsel or the court's own motion, a sentencing court in a
19 felony case may order the preservation of any biological material that
20 has been secured in connection with a criminal case, or evidence
21 samples sufficient for testing. The court must specify the samples to
22 be maintained and the length of time the samples must be preserved.

23 NEW SECTION. Sec. 2. This act is necessary for the immediate
24 preservation of the public peace, health, or safety, or support of the
25 state government and its existing public institutions, and takes effect
26 immediately.

--- END ---

HOUSE BILL REPORT

SHB 1014

As Passed Legislature

Title: An act relating to DNA testing.

Brief Description: Revising DNA testing provision.

Sponsors: By House Committee on Criminal Justice & Corrections (originally sponsored by Representatives Darneille, O'Brien, Cody, Morrell, Chase and Schual-Berke).

Brief History:

Committee Activity:

Criminal Justice & Corrections: 1/21/05 [DPS].

Floor Activity:

Passed House: 1/26/05, 96-0.

Senate Amended.

Passed Senate: 2/16/05, 47-0.

House Concurred.

Passed House: 2/28/05, 95-0.

Passed Legislature.

Brief Summary of Substitute Bill

- Eliminates the dates and deadlines established for convicted persons to request postconviction deoxyribonucleic acid (DNA) testing.
- Requires requests for postconviction DNA testing to be submitted directly to the courts instead of the Office of Public Defense (OPD) and the county prosecutor's office.
- Provides for indigent persons to obtain legal counsel in order to prepare and present a motion for postconviction DNA testing.
- Requires all biological material secured in connection with a criminal case to be preserved for a length of time as defined by the court.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass.
Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Pearson, Ranking Minority Member; Ahern, Kagi, Kirby and Strow.

Staff: Yvonne Walker (786-7841).

Background:

Postconviction DNA Testing. Through December 31, 2004, a person sentenced to imprisonment for a felony conviction who has been denied DNA testing may request postconviction DNA testing, if the DNA testing was not admitted at his or her trial because:

- The court ruled that DNA testing did not meet acceptable scientific standards; or
- DNA testing technology was not sufficiently developed to test the DNA evidence in the case.

On or after January 1, 2005, a person must raise the DNA issues at trial or on appeal.

A request for postconviction DNA testing must be submitted to the OPD. The OPD then transmits the request to the county prosecutor's office in the county where the conviction was obtained. The prosecutor screens the request and determines whether:

- the evidence still exists; and
- there is a likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

The prosecutor must inform both the requestor and the OPD of the decision on testing. If the prosecutor denies the request, the prosecutor must advise the requestor of appeals rights.

Appeals of Prosecutorial Denials. Upon the denial of a request for postconviction DNA testing, the decision may be appealed to the Office of the Attorney General (AG). The request must be granted if the AG's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis.

DNA Testing. The DNA testing, if ordered, must be conducted by the Washington State Patrol Crime Laboratory.

Biological material secured in connection with a criminal case prior to July 22, 2001, may not be destroyed before January 1, 2005.

Summary of Substitute Bill:

All sunset provisions originally established for convicted persons to request postconviction DNA testing are eliminated.

Under the Act, any person sentenced to imprisonment for a felony conviction may submit a written motion directly to the court of conviction requesting postconviction DNA testing. A copy of the motion must also be submitted to the OPD.

Each motion requesting DNA testing must state the following:

- the court ruled that DNA testing did not meet acceptable scientific standards;
- that the DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or

- the DNA testing currently being requested would be significantly more accurate than prior DNA testing or would provide significant new information.

In addition, the motion must: (1) explain why the DNA evidence is material to the identity of the perpetrator or accomplice involved in the crime or to the sentence enhancement; and (2) comply with all procedural requirements established by court rule.

If the motion submitted to the court meets the appropriate standards and the person sentenced to imprisonment has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis, the court (instead of the prosecutor) must grant the motion to request DNA testing.

Upon a written request to the court, the court may in its discretion appoint legal counsel to solely prepare and present a motion for postconviction DNA testing for an indigent person serving a term of imprisonment. A motion for appointment of counsel must comply with all procedural requirements established by court rule.

Appeals of Prosecutorial Denials. The appeals process previously handled by the AG is eliminated.

DNA Testing. All DNA testing, if ordered, will continued to be conducted by the Washington State Patrol Crime Laboratory.

The court must adopt rules for the preservation of all biological material and evidence samples in connection with criminal cases.

Upon the motion of defense counsel or at the court's own motion, all biological material or evidence samples that have been secured in connection with a criminal case must be preserved. The court must specify the samples to be maintained and the length of time the samples must be preserved.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: This bill contains an emergency clause and takes effect immediately.

Testimony For: This was an agreed upon bill in 2004, but due to lack of time, the Legislature did not get a chance to have it moved and voted off the suspension calendar.

In addition, President Bush has recently signed the Justice for All Act which provides legal protections to ensure that people that have been falsely imprisoned have not been victimized by our judicial system. Some federal funding, totaling \$755 million, may be available through the act to help states clean out the backlog of postconviction DNA testing and evidence. In order to receive a portion of that initiative funding, state law must conform with federal law. This bill as drafted meets those standards.

The current state statute expired on December 31, 2004 and as a result, the amendment providing an emergency provision to the bill will fix that sunset provision and will allow the bill to go into effect as soon as possible. In addition, the amendment that adds a court rule to the bill is a good provision. It can often get confusing as to what DNA evidence does and does not have to be preserved.

DNA testing has been a remarkable tool for overturning wrongful convictions across the United States. To date there have been at least 154 people that have had their cases overturned due to postconviction DNA testing. One particular example in Washington was a Clark County case where a person was convicted for child rape, but after eight years the DNA evidence found the person innocent.

DNA testing helps to ensure that justice is administered correctly for those few people that have been convicted of crimes that they did not commit.

Testimony Against: None.

Persons Testifying: (In support) Representative Darneille, sponsor; Joanne Moore and Mary Jane Ferguson, Washington State Office of Public Defense; Dan Satterberg, Washington Association of Prosecuting Attorneys and King County Prosecuting Attorneys Office; Jacqueline McMurtie, Assistant Professor, Innocence Project Northwest, Washington Association of Criminal Defense Lawyers, and Washington Defenders Association; and Barry Logan, Director of Forensic Lab, Washington State Patrol.

(Comments only) Michael Fuller, Association Against Homelessness in America.

(In support with amendments) Debbie Wilke, Washington Association of County Officials.

Persons Signed In To Testify But Not Testifying: None.

Multiple Agency Fiscal Note Summary

Bill Number: 1014 S HB PL	Title: DNA testing
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Estimated Cash Receipts

Agency Name	2005-07		2007-09		2009-11	
	GF- State	Total	GF- State	Total	GF- State	Total
Total \$						

Local Gov. Courts *						
Local Gov. Other **						
Local Gov. Total						

Estimated Expenditures

Agency Name	2005-07			2007-09			2009-11		
	FTEs	GF-State	Total	FTEs	GF-State	Total	FTEs	GF-State	Total
Office of Administrator for the Courts	.0	1,086	1,086	.0	1,077	1,077	.0	1,086	1,086
Washington State Patrol	.5	17,400	17,400	.5	17,400	17,400	.5	17,400	17,400
Total	0.5	\$18,486	\$18,486	0.5	\$18,477	\$18,477	0.5	\$18,486	\$18,486

Local Gov. Courts *	.1		9,778	.1		6,830	.1		6,830
Local Gov. Other **	Non-zero but indeterminate cost. Please see discussion.								
Local Gov. Total	.1		9,778	.1		6,830	.1		6,830

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Prepared by: Garry Austin, OFM	Phone: 360-902-0564	Date Published: Final 3/ 2/2005
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* See Office of the Administrator for the Courts judicial fiscal note

** See local government fiscal note

APPENDIX K

Judicial Impact Fiscal Note

Bill Number: 1014 S HB PL	Title: DNA testing	Agency: 055-Office of Administrator for Courts
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Part I: Estimates

☐ No Fiscal Impact

Estimated Cash Receipts to:

FUND	FY 2006	FY 2007	2005-07	2007-09	2009-11
Counties					
Cities					
Total \$					

Estimated Expenditures from:

STATE	FY 2006	FY 2007	2005-07	2007-09	2009-11
State FTE Staff Years					
Fund					
General Fund-State 001-1	543	543	1,086	1,077	1,086
State Subtotal \$	543	543	1,086	1,077	1,086
COUNTY	FY 2006	FY 2007	2005-07	2007-09	2009-11
County FTE Staff Years	.1	.1	.1	.1	.1
Fund					
Local - Counties	6,363	3,415	9,778	6,830	6,830
Counties Subtotal \$	6,363	3,415	9,778	6,830	6,830
CITY	FY 2006	FY 2007	2005-07	2007-09	2009-11
City FTE Staff Years					
Fund					
Local - Cities					
Cities Subtotal \$					
Local Subtotal \$	6,363	3,415	9,778	6,830	6,830
Total Estimated Expenditures \$	6,906	3,958	10,864	7,907	7,916

The revenue and expenditure estimates on this page represent the most likely fiscal impact. Responsibility for expenditures may be subject to the provisions of RCW 43.135.060.

Check applicable boxes and follow corresponding instructions:

- ☐ If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- ☒ If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- ☒ Capital budget impact, complete Part IV.

Legislative Contact:	Phone:	Date: 02/28/2005
Agency Preparation: Yvonne Pettus	Phone: (360) 705-5314	Date: 02/28/2005
Agency Approval: Jeff Hall	Phone: 360-357-2131	Date: 03/01/2005
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 03/01/2005

Request # -1

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact on the Courts

This bill would allow a person convicted of a felony to make a motion to the superior court in which he or she was convicted requesting DNA testing. The superior court must rule on the motion and may grant an offender's request for court-appointed counsel.

II. B - Cash Receipts Impact

II. C - Expenditures

SUPERIOR COURT STANDARD ASSUMPTIONS

Staff Ratio:

2.5 superior court staff per judicial officer

3.5 county clerk staff per judicial officer

County Cost—Salary and Benefits:

\$62,206 per judicial officer (50% salary, no benefits)

\$44,205 per superior court non-judicial FTE

\$44,293 per county clerk FTE

County Cost—Operational:

\$164,273 per judicial officer

\$6,341 per county clerk FTE

Capital Facility Requirements:

1,970 sq. ft. per judicial officer

120 sq. ft. per superior court non-judicial FTE

120 sq. ft. per county clerk FTE

State Cost—Salary and Benefits:

\$81,786 per judicial officer (50% salary and 100% benefits)

Notes:

- Staff ratio data from 2003 Caseloads of the Courts of Washington.
- Superior court judges' salary set by the Salary Commission. The county pays for half of the judges' salary only and the state pays for half the salary and 100% of the benefits.
- Local operational cost and staff salary and benefit data from the Washington State Auditor's Office.
- A 1998 study by the National Center for State Courts, entitled The Courthouse: A Planning and Design Guide for Court Facilities recommends that each superior court judicial officer requires 1,970 square feet and that each support staff position requires 120 square feet. Washington State House of Representatives Capital Budget staff estimate that the average cost per square foot for new government building construction is \$165.

Based upon the statutorily mandated (RCW 2.56.030) judicial officer needs methodology, only 88 percent of the total superior court judicial need is currently being met. This translates into 29.6 judicial positions that are not currently authorized or filled. The cumulative impact of this and other legislation, if passed without funding, would further erode the courts' ability to provide criminal and civil justice to the state's citizens.

ANALYSIS

According to the Office of Public Defense (OPD), in the past four years, there has been approximately 1 request per month for DNA testing. OPD estimated in the future that there will be fewer than 10 requests per year.

It is estimated that hearings for these cases would require 45 minutes. Based on 10 cases per year, the judicial time required would be the equivalent of 0.01 new superior court judges. The increase of 0.01 new superior court judges would result in a need for 0.02 administrative staff and 0.02 county clerk staff. The state pays 50 percent of the judges' salary and 100 percent of the judges' benefits. The state's portion for FY 06 would be \$543. The counties' portion of the judges' salary would be \$413.

Based on 2003 data from the State Auditor's office, the salary and benefit costs for superior court staff would be \$734 and for county clerk staff the salary and benefit costs would be \$1,030. The superior court operational costs would be \$1,091 and the county clerk operational costs would be \$147.

Additionally, county clerks would be responsible for maintaining the biological samples. The clerks may incur additional costs for storage of these samples.

An additional cost that could potentially be quite high is for expert witnesses. These costs should be reflected in the fiscal note for local government.

Part III: Expenditure Detail

III. A - Expenditure By Object or Purpose (State)

State	FY 2006	FY 2007	2005-07	2007-09	2009-11
FTE Staff Years					
Salaries and Wages	413	413	826	826	826
Employee Benefits	130	130	260	260	260
Personal Service Contracts					
Goods and Services					
Travel					
Capital Outlays					
Inter Agency/Fund Transfers					
Grants, Benefits & Client Services					
Debt Service					
Interagency Reimbursements					
Intra-Agency Reimbursements					
Total \$	543	543	1,086	1,086	1,086

III. B - Expenditure By Object or Purpose (County)

County	FY 2006	FY 2007	2005-07	2007-09	2009-11
FTE Staff Years	.1	.1	.1	.1	.1
Salaries & Benefits	2,177	2,177	4,354	4,354	4,354
Capital	2,948		2,948		
Other	1,238	1,238	2,476	2,476	2,476
Total \$	6,363	3,415	9,778	6,830	6,830

III. C - Expenditure By Object or Purpose (City)

City	FY 2006	FY 2007	2005-07	2007-09	2009-11
FTE Staff Years					
Salaries & Benefits					
Capital					
Other					
Total \$					

III. D - FTE Detail

Job Classification	Salary	FY 2006	FY 2007	2005-07	2007-09	2009-11
County Clerk Staff	44,293	0.0	0.0	0.0	0.0	0.0
Superior Court Admin Staff	44,205	0.0	0.0	0.0	0.0	0.0
Superior Court Judge	124,410	0.0	0.0	0.0	0.0	0.0
Total FTE's		0.1	0.1	0.1	0.1	0.1

Part IV: Capital Budget Impact

Identify acquisition and construction costs not reflected elsewhere on the fiscal note and describe potential financing methods

Construction Estimate	FY 2006	FY 2007	2005-07	2007-09	2009-11
Acquisition					
Construction					
Other	2,948		2,948		
Total \$	2,948		2,948		

For every new superior court judge, 1,970 square feet are needed. For every clerical position, 120 square feet are needed. The cost per square foot is estimated by Capital Budget staff to be \$165. Therefore, the cost for this bill would be \$2,948.

Individual State Agency Fiscal Note

Bill Number: 1014 S HB PL	Title: DNA testing	Agency: 225-Washington State Patrol
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Part I: Estimates

☐ No Fiscal Impact

Estimated Cash Receipts to:

FUND					
Total \$					

Estimated Expenditures from:

	FY 2006	FY 2007	2005-07	2007-09	2009-11
FTE Staff Years	0.5	0.5	0.5	0.5	0.5
Fund					
General Fund-State 001-1	8,700	8,700	17,400	17,400	17,400
Total \$	8,700	8,700	17,400	17,400	17,400

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- ☐ If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- ☒ If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- ☐ Capital budget impact, complete Part IV.
- ☐ Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 02/28/2005
Agency Preparation: Heidi Thomsen	Phone: (360) 753-0626	Date: 02/28/2005
Agency Approval: Diane C. Perry	Phone: 360-753-0221	Date: 03/01/2005
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 03/01/2005

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

The 2000 Legislature enacted Substitute House Bill 2491 (Chapter 92, Laws of 2000) which allowed for postconviction deoxyribonucleic acid (DNA) testing of evidence related to cases of persons sentenced to death or life imprisonment without possibility of release. During the 2001 Legislature, SSB 5896 (Chapter 301, Laws of 2001) was enacted and allowed for DNA testing of evidence related to cases of persons who were convicted of a felony and are currently serving a term of imprisonment. In addition, it extended a one-time eligibility for DNA testing to all felons imprisoned on or before December 31, 2004 who were denied postconviction DNA testing.

The 2003 Legislature enacted House Bill 1391 which required persons requesting postconviction DNA testing to submit their request to the state Office of Public Defense who would transmit the request to the appropriate county prosecutor. The prosecutor was responsible for accepting or denying the request.

Substitute House Bill 1014 amends the 2003 legislation to allow for any person convicted of a felony in Washington state who is currently serving a term of life imprisonment to submit to the court a request for DNA testing with a copy of the motion provided to the state office of public defense, provided that:

- the court ruled that DNA testing did not meet acceptable scientific standards; or
- DNA testing technology was not sufficiently developed to test DNA evidence in the case; or
- DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information.

The court shall grant a motion requesting DNA testing if the convicted person has demonstrated the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. DNA testing shall be performed by the Washington State Patrol Crime Laboratory. A sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of the evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

None.

II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.

The Washington State Patrol's Crime Laboratory Division estimates that as a result of Substitute House Bill 1014 there will be approximately 24 DNA criminal cases submitted each year. Since one fully trained forensic scientist could process about 55 DNA criminal cases each year (there is currently a six-month time lag between hiring a scientist and providing the additional training and validation to meet national DNA analysis guidelines), the Patrol would need one-half FTE to perform the work required under this bill.

In the 2001-03 Biennium, the Patrol received an appropriation of \$100,000 (SSB 5896) for postconviction DNA testing of evidence related to cases of persons sentenced to death or life imprisonment without the possibility of release. This allocation carried forward in the 2003-05 biennium and has been spent on overtime and DNA kits. The estimated cost for the .5 FTE to process 24 cases for FY 2006 is \$58,700 and \$117,400 per biennium in the future. The agency is requesting

the difference between the total estimated annual cost and the \$50,000 per fiscal year that is currently in the Crime Laboratory's budget. (The agency assumes that since Sustain House Bill 1014 removes the expiration date for postconviction testing (December 31, 2004), these funds will carry forward to subsequent biennia.)

If the number of postconviction DNA cases increases beyond the estimated 24 cases per year, the agency will submit a decision package through the regular budget process to cover the additional costs.

Part III: Expenditure Detail

III. A - Expenditures by Object Or Purpose

	FY 2006	FY 2007	2005-07	2007-09	2009-11
FTE Staff Years	0.5	0.5	0.5	0.5	0.5
A-Salaries and Wages	7,000	7,000	14,000	14,000	14,000
B-Employee Benefits	1,700	1,700	3,400	3,400	3,400
C-Personal Service Contracts					
E-Goods and Services					
G-Travel					
J-Capital Outlays					
M-Inter Agency/Fund Transfers					
N-Grants, Benefits & Client Services					
P-Debt Service					
S-Interagency Reimbursements					
T-Intra-Agency Reimbursements					
Total:	\$8,700	\$8,700	\$17,400	\$17,400	\$17,400

III. B - Detail: List FTEs by classification and corresponding annual compensation. Totals need to agree with total FTEs in Part I and Part IIIA

Job Classification	Salary	FY 2006	FY 2007	2005-07	2007-09	2009-11
Forensic Scientist 3	60,180	0.5	0.5	0.5	0.5	0.5
Total FTE's		0.5	0.5	0.5	0.5	0.5

Part IV: Capital Budget Impact

None.

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

None.

Part IV: Analysis

A. SUMMARY OF BILL

Provide a clear, succinct description of the bill with an emphasis on how it impacts local government.

This bill grants persons convicted of a felony the right to make a motion to the convicting superior court requesting DNA testing of evidence (Sec. 1).

The sentencing court can order biological material be preserved in accordance with any court rule adopted for the preservation of evidence, and the court must identify which samples must be maintained and the length of time to be preserved (Sec. 1).

The bill contains an emergency clause and would take effect immediately (Sec. 2).

DIFFERENCES BETWEEN THE ORIGINAL AND THE SUBSTITUTE BILL:

The original bill (HB 1014) was not considered in this analysis, however, the companion bill (SB 5003) was considered in a separate fiscal note: Additional language is added to require that if the court orders evidence to be preserved, it should be in accordance with any court rule adopted for the preservation of evidence. An emergency clause is added to the bill.

B. SUMMARY OF EXPENDITURE IMPACTS

Briefly describe and quantify the expenditure impacts of the legislation on local governments, identifying the expenditure provisions by section number, and when appropriate, the detail of expenditures. Delineate between city, county and special district impacts.

SHB 1014 impacts local government expenditures through the involvement of prosecutors with convicted felon motions requesting DNA testing, the potential need for expert witnesses, the jail cost for temporarily housing, and the storage of evidence by local law enforcement agencies. It is estimated that minimum county costs for handling a review hearing may total \$10,200 per year based on an estimate of 10 hearings annually. This includes prosecution costs of \$4,000 per year and jail bed costs of \$6,200 per year.

However, there are several additional costs noted above that may be incurred but remain unknown at this time. (See discussion below for greater detail.)

Base Costs:

\$4,000

\$6,200

\$10,200 per year*

* Does not include potential local government costs for a DNA expert witness (estimated to be \$3,000 to \$12,000 per case), and future evidence storage costs determined by the court on a case-by-case basis.

DISCUSSION:

Number of requests:

According to the Office of Public Defense (OPD), 25 requests have been made for DNA testing in three years. OPD estimates that 10 requests will be made each year in the future.

Hearings:

Defense Costs: The Office of Public Defense fiscal note will discuss indigent defense costs. The state would pay these costs if the convicted felon qualifies for indigent defense.

Prosecution Costs:

As the cases involved are felonies, the cost of prosecuting the motion would fall to the counties. Using conservative estimations, at least 10 hours of prosecutorial time will be expended preparing for these hearings. Additional time may be required in order to locate victims and/or victim's survivors. Therefore the cost of prosecuting can be estimated at

10 requests x (10 hours x \$40/hr prosecutor salary) = \$4,000 per year.

Expert Witness Costs:

It is uncertain to what extent expert witnesses would be needed at the initial hearing, however for those cases where a DNA expert was required the cost would range from \$3,000 to \$12,000 per case depending on the service provided, distance the expert has to travel and the number of hours the expert works on the case. In cases where the defendant is indigent, the county would pay for this cost.

Court Costs:

Court costs are addressed in the Administrative Office of the Courts (AOC) fiscal note.

Jail Costs: Felons will need to be transported from prison to the county jail and housed in the county jail during the proceeding, as transport and hearings rarely occur on the same day. Washington Association of

Prosecuting Attorneys estimate felons requesting review will need to be housed in county jails for 10 days, therefore the jail bed costs can be estimated at: 10 requests x (10 days x \$62 per day) = \$6,200 per year.

Evidence Storage:

Local government agencies may incur additional costs to retain and maintain biological DNA evidence in their property rooms. Preservation orders under this bill must be consistent with any court rules adopted for preservation of evidence

Due to a number of variables that cannot be quantified, the extent of fiscal impact to these local agencies is unknown. These factors include the number of defense motions that are granted for preserving biological evidence, the specific samples ordered to be retained, whether existing space will accommodate most of this evidence, and the length of time the sentencing court would require it to be stored. LGFN assumes court rules will be adopted as necessary to create uniform preservation requirements.

SUBSTITUTE BILL IMPACT COMPARED TO ORIGINAL BILL:

No change.

SOURCES:

LGFN 2005 Fiscal Note for SB 5003

Office of Public Defense

Washington Association of Prosecuting Attorneys

Washington Association of County Officials

2004 Salary and Benefit Survey by Association of Washington Cities

LGFN 2000 Survey of County Prosecutors

LGFN 2004 Jail Rate Data

LGFN 2004 Fiscal Note for HB 2782

C. SUMMARY OF REVENUE IMPACTS

Briefly describe and quantify the revenue impacts of the legislation on local governments, identifying the revenue provisions by section number, and when appropriate, the detail of revenue sources. Delineate between city, county and special district impacts.

No impact on local government revenue.

LOCAL GOVERNMENT FISCAL NOTE

Department of Community, Trade and Economic Development

Bill Number: 1014 S HB PL

Title: DNA testing

Part I: Jurisdiction-Location, type or status of political subdivision defines range of fiscal impacts.

Legislation Impacts:

☐ Cities:

☒ Counties:

☐ Special Districts:

☐ Specific jurisdictions only:

☐ Variance occurs due to:

Part II: Estimates

☐ No fiscal impacts.

☐ Expenditures represent one-time costs:

☐ Legislation provides local option:

☒ Key variables cannot be estimated with certainty at this time: The number of experts involved, the number of defense or court motions retaining biological evidence; the type of evidence and length of storage ordered by the court

Estimated revenue impacts to:

Jurisdiction	FY 2006	FY 2007	2005-07	2007-09	2009-11
City					
County					
Special District					
TOTAL \$					
GRAND TOTAL \$					

Estimated expenditure impacts to:

Indeterminate Impact

Part III: Preparation and Approval

Fiscal Note Analyst: Paul Johnson	Phone: 360-725-5030	Date: 02/28/2005
Leg. Committee Contact:	Phone:	Date: 02/28/2005
Agency Approval: Louise Deng Davis	Phone: (360) 725-5034	Date: 03/02/2005
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 03/02/2005